

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 05-44481-rdd

4 - - - - - x

5 In the Matter of:

6 DPH HOLDINGS CORP, et al. and DIP HOLDCO, LLP d/b/a

7 DELPHI AUTOMOTIVE, LLP,

8 Debtors.

9 - - - - - x

10 Adversary No. 07-02236-rdd

11 In the Matter of:

12 DELPHI CORPORATION, ET AL.

13 v.

14 DSSI, et al.

15 - - - - - x

16 United States Bankruptcy Court

17 One Bowling Green

18 New York, New York

19 May 24, 2012

20 10:13 a.m.

21

22 B E F O R E :

23 HON ROBERT D. DRAIN

24 U.S. BANKRUPTCY JUDGE

25 ECR OPERATOR: LONNIE WEBB

Page 2

1 Notice of Agenda Proposed by Fifty-Fourth Claims Hearing
2 Agenda
3

4 Sufficiency Hearing Regarding Proofs of Claim Numbers 15514,
5 15525 and 15526
6

7 Notice of Agenda Proposed Seventy-Sixth Omnibus Hearing
8 Agenda
9

10 Motion by James Sumpter Regarding Extending Disability
11 Benefits for Salaried Employees and Salaried Retirees -
12 Vesting Motion Regarding Extending Disability Benefits for
13 Salaried Employees and Salaried Retirees
14

15 Motion by James Sumpter for Preliminary Injunction Regarding
16 Salaried Disability - Expedited Request for Preliminary
17 Injunction to Prohibit DPHH from Terminating Salaried
18 Disability Plan
19

20 Motion by Ontario Specialty Contracting, Inc. for Allowance
21 of an Administrative Claim Pursuant to 11 U.S.C.
22 503(B)(1)(A), or in the Alternative, for Leave to File a
23 Late Administrative Expense Claim Pursuant to Federal Rule
24 of Bankruptcy Procedure 9006(b)
25

Page 3

1 **Motion by James Grail to Lift Stay**

2

3 **Motion to Dismiss Adversary Proceeding Motion of the DSSI**

4 **Defendants For An Order Denying Plaintiffs' Motion to Amend**

5 **the Complaint and, to the Extent Necessary, Dismissing the**

6 **Adversary Proceeding With Prejudice.**

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25 **Transcribed by: Sherri L. Breach, CERT*D-397**

Page 4

1 A P P E A R A N C E S :

2 SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

3 Attorneys for Debtors

4 155 North Wacker Drive

5 Chicago, Illinois 60606-1720

6

7 BY: JOHN K. LYONS, ESQ.

8 LOUIS S. CHIAPPETTA, ESQ.

9

10 BUTZEL LONG

11 Attorneys for DPH Holdings Corp.

12 Suite 100

13 150 West Jefferson

14 Detroit, Michigan 48226

15

16 BY: DAVID J. DEVINE, ESQ.

17 CYNTHIA J. HAFFEY, ESQ.

18

19 BUTZEL LONG

20 Attorneys for DPH Holdings Corp.

21 22nd Floor

22 380 Madison Avenue

23 New York, New York 10017

24

25 BY: MARIA CACERES-BONEAU, ESQ.

Page 5

1 KLESTADT & WINTERS, LLP

2 Attorneys for Ontario Specialty Contracting

3 570 Seventeenth Avenue

4 17th Floor

5 New York, New York 10018

6

7 BY: PATRICK J. ORR, ESQ.

8

9 FOX ROTHSCHILD, LLP

10 Attorneys for DSSI defendants

11 75 Eisenhower Parkway

12 Suite 200

13 Roseland, New Jersey 07068

14

15 BY: RICHARD M. METH, ESQ.

16

17 DUANE MORRIS, LLP

18 Attorneys for ACE American Insurance Co.

19 30 South 17th Street

20 Philadelphia, Pennsylvania 19103-4196

21

22 BY: LEWIS R. OLSHIN, ESQ.

23

24

25

Page 6

1 STATE OF MICHIGAN
2 BILL SCHUETTE, ATTORNEY GENERAL
3 Attorneys for Joint Michigan Defendants
4 Labor Division
5 5th Floor G. Mennen Williams Building
6 525 West Ottawa Street
7 P.O. Box 30736
8 Lansing, Michigan 48909
9

10 BY: SUSAN PRZEKOP-SHAW, ESQ.

11 DENNIS J. RATERINK, ESQ.

12

13 GREENEBAUM DOLL & McDONALD, PLLC
14 Attorneys for DSSI Defendants
15 3500 National City Tower
16 101 South Fifth Street
17 Louisville, Kentucky 40202
18

19 BY: CLAUDE R. "CHIP" BOWLES, JR., ESQ.

20

21 APPEARED TELEPHONICALLY:
22 NICK CAMPANARIO
23 RENU SHAW
24 DOUG VETTER
25

1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 Okay. Good morning. In re: DPH Holdings.

4 MR. CHIAPPETTA: Yes. Good morning, Your Honor.

5 Louis Chiappetta of Skadden Arps on behalf of the
6 reorganized debtors, here with my colleague, John Lyons. On
7 the line is Nick Campanario, also of Skadden, Arps. Also
8 here with me is Cyndi Haffey, Maria Caceres-Boneau and David
9 DeVine of Butzel-Long, and Denon Rue (ph) is here on behalf
10 of the company.

11 Your Honor, there are no contested matters for the
12 scheduled fifty-fourth claims hearing. We resolved the one
13 matter last night and a stipulation was sent to Your Honor.

14 THE COURT: That was with --

15 MR. CHIAPPETTA: One --

16 THE COURT: That was with Johnson Controls?

17 MR. CHIAPPETTA: Correct.

18 THE COURT: Right.

19 MR. CHIAPPETTA: One contested matter scheduled
20 for the seventy-sixth omnibus hearing and one contested
21 matter for the adversary hearing.

22 THE COURT: Okay.

23 MR. CHIAPPETTA: We filed proposed agendas for the
24 seventy-sixth omnibus hearing and the fifty-fourth claims
25 hearing at docket numbers 21890 and 21891, and with your

Page 8

1 permission I would like to proceed with those.

2 THE COURT: That's fine.

3 MR. CHIAPPETTA: Okay.

4 So, as I said, we were able to resolve the one
5 matter that was contested, Johnson Controls, Inc. regarding
6 proof of claim numbers 15514, 15525 and 15526, and that
7 stipulation was submitted to Your Honor -- Your Honor last
8 night.

9 Just wanted to update you on the progress of the
10 claims, Your Honor. We are down to seven prepetition claims
11 out of over 20,000 claims that were filed in this case. We
12 have 21 administrative claims. Out of the original 42
13 debtors we've closed 30 of them, and there are three of the
14 12 remaining that are ready to be closed. So we're making
15 significant claims in the claims and I just wanted to --

16 THE COURT: Okay.

17 MR. CHIAPPETTA: -- let you know about that.

18 THE COURT: All right.

19 MR. CHIAPPETTA: I'm going to proceed with the
20 seventy-sixth omnibus hearing.

21 There are three uncontested matters. Matters 1
22 and 2 were the motions by James Sumpter filed at docket
23 numbers 21860 and 21867. Those were resolved pursuant to
24 the orders entered by Your Honor at docket numbers 21876 and
25 21877.

1 THE COURT: Right.

2 MR. CHIAPPETTA: The last uncontested matter is
3 the amended motion of James Grail at docket number 21682,
4 and I want to update Your Honor on this matter.

5 We've mentioned this at several hearings before;
6 that there's several parties to this stipulation. The
7 reorganized debtors have been able to reach out and have
8 conversations regarding the proposed stipulation with
9 General Motors, the ACE Insurance Companies, the Michigan
10 defendants, everyone except for Mr. Grail's attorney, Mr.
11 Dowd (ph). We've made several phone calls. We've sent
12 overnight versions of the stipulation to Mr. Dowd. We've --
13 don't have a working email address for him, so we requested
14 --

15 THE COURT: Because that's -- that's funny because
16 I thought he was actually on board with the whole concept.
17 He was one of the first people that was behind this idea of
18 a stipulation.

19 MR. CHIAPPETTA: This is why we're -- we're asking
20 Your Honor for guidance. We're --

21 THE COURT: Okay.

22 MR. CHIAPPETTA: -- we're trying to get Mr. Dowd
23 to engage. He has not provided us with a working email
24 address so we've been overnight mailing versions to him.

25 THE COURT: All right.

Page 10

1 MR. CHIAPPETTA: At this point --

2 THE COURT: Well, have you mailed it to his
3 office?

4 MR. CHIAPPETTA: Yes, we have.

5 THE COURT: And you haven't gotten any response?

6 MR. CHIAPPETTA: No response, followed up with
7 phone calls days after the we've sent the proposed
8 stipulation, and --

9 THE COURT: Have you reached out to Mr. Grail
10 himself?

11 MR. CHIAPPETTA: We've not reached out to Mr.
12 Grail --

13 THE COURT: I -- I know that you would be
14 reluctant --

15 MR. CHIAPPETTA: -- himself.

16 THE COURT: -- to do that because he's represented
17 by counsel.

18 MR. CHIAPPETTA: Exactly.

19 THE COURT: But if you can't reach counsel, which
20 you're telling me, I -- I authorize you to do that. Maybe
21 he knows where -- where Mr. Dowd is. And my other reaction
22 to this is that if you still can't reach him in the
23 relatively near future, you should, I think, settle, by
24 notice of presentment, a copy of the stipulation and order
25 and just take his name off of it. And this would resolve

Page 11

1 it, and put it on notice to him and to Mr. Grail.

2 MR. CHIAPPETTA: I believe, Your Honor, that the
3 Michigan defendants are on the line and may -- may have a
4 response to that.

5 THE COURT: Okay.

6 MR. RATERINK: Yeah. Your Honor, Dennis Raterink
7 here on behalf of the Michigan Funds Administration. Good
8 morning.

9 THE COURT: Morning.

10 MS. PRZEKOP-SHAW: And I'm Susan Przekop-Shaw here
11 on behalf of the Michigan Workers' Compensation Agency.
12 Good morning.

13 THE COURT: Good morning.

14 MR. RATERINK: You know, as to the first issue,
15 Judge, we just found out last night about the problems that
16 have been going on in contacting Mr. Dowd. As we are in
17 Michigan, we may have some better efforts. We do have some
18 bit of a preexisting relationship with him and we can --

19 THE COURT: Okay.

20 MR. RATERINK: -- make attempts as well to --

21 THE COURT: No. That's great. I -- I'm glad
22 you're doing that. I mean --

23 MR. RATERINK: Yeah.

24 THE COURT: -- the most -- the most preferable
25 course would be to actually get a hold of him because I

Page 12

1 don't think he'll be a problem since he, again, was behind
2 this concept in the first place.

3 MR. RATERINK: Right. And we're not sure what the
4 -- what the holdup has been on -- on -- in terms of contact
5 from him. But we will make efforts to reach out to him as
6 well.

7 THE COURT: Okay. Great.

8 MR. RATERINK: As to the stipulation, we just
9 wanted to put -- put the Court on notice of a couple of
10 things.

11 Number one, we're still having considerable
12 difficulties, both mine and -- and my client and Susan's
13 client regarding the concept of a stipulation. As Your
14 Honor is well aware, we have been litigating issues
15 regarding subject matter jurisdiction and sovereign immunity
16 regarding Michigan's involvement, the workers' compensation
17 system's interaction with this Court for -- for some time
18 now. And we're very hesitant and reluctant to -- to engage
19 in a stipulation which we don't feel is necessary to obtain
20 the release that -- that's being sought by Mr. Dowd in this
21 case.

22 What we were proposing, and were talking to
23 counsel about last night, was the idea that apart from Mr.
24 Dowd, most of the parties seem to have a general agreement
25 as to about 70 cases that are -- that -- that we've narrowed

Page 13

1 this down to. We think that we can simply contact the
2 appropriate state officials, the chief magistrate of the
3 board of magistrates who oversees these cases as well as the
4 workers' comp agency director, give them guidance and say,
5 you know, look, the parties -- the parties that are at issue
6 here are in agreement on this and -- and all agree that the
7 ACE proceedings, the ACE litigation is having no impact and
8 should not be considered in terms of the ongoing litigation
9 of those files.

10 We can tell you that in the research and
11 investigation that we've done -- like I indicated, we've
12 narrowed this down to 70 files -- we cannot identify any of
13 them at this point that are being held up because of the ACE
14 interaction issue. Fifty-five of the files are being -- are
15 on a status that the workers' comp agency refers to as await
16 other status, but they're in that status because of an issue
17 involving General Motors in a coordination of benefits issue
18 that's being litigated in -- in federal court in Michigan,
19 completely separate and unrelated to the Delphi or ACE
20 issues.

21 The other cases we have a listing of them.
22 Several are -- are awaiting resolution because of what's
23 called a CMS issue or where they're trying to take the
24 Medicare systems interests into account. Four of the cases
25 on the list have been completely settled out and redeemed.

Page 14

1 Two are -- two are just erroneous, we believe, because they
2 are non-Delphi employers, nothing in the automotive system
3 or automotive area at all. Two do involve ACE as a listed
4 party, so we -- we're trying to resolve that issue to make
5 -- get them off of the list.

6 We find three cases only that are in active
7 litigation and there's no indication that those three active
8 files are actually being held up because of the ACE/Delphi
9 litigation.

10 So we would propose to -- like we -- like we
11 indicated, to just simply contact the appropriate state
12 officials with this information so that everybody has all
13 the same information and they can go forward and -- and Mr.
14 Dowd, hopefully, should be happy with that, knowing that the
15 ACE stay is having no effect on these cases.

16 THE COURT: Well, I -- I can't speak for the
17 relevant hearing officers or the -- whoever you would be
18 contacting, but I can tell you that if I were in their
19 position I would be uncomfortable with just a -- a contact
20 without something to back it up. I know this is Michigan
21 and not Missouri, but I would say, show me.

22 (Laughter)

23 THE COURT: And so I -- you know, I -- again, I
24 understand your -- fully the issue about jurisdiction, et
25 cetera. But I thought the stipulation -- I mean, the whole

Page 15

1 point of the stipulation was that it would -- it made it
2 clear that it had no effect whatsoever on those arguments;
3 that it was not going to in any way have any bearing on --
4 on those issues.

5 I just think it -- it's -- it's a lot cleaner if
6 you actually have an order that says this is -- this is
7 fine. It doesn't violate any stay or anything like that,
8 and the only hold up, I guess, is that people can't locate
9 Mr. Dowd, but maybe -- I mean, hopefully we can or -- or you
10 can or the debtors can over the next, you know, week or two.

11 But it would seem to me that -- that -- I mean,
12 it's his motion, ultimately --

13 MR. RATERINK: Certainly.

14 THE COURT: The way to resolve it would be by this
15 order, which could be done by a notice of presentment. And
16 -- and if he's not able to sign it, then at least he -- you
17 know, we -- we would -- or we could actually have it on for
18 the next hearing date. I mean, we've been carrying his
19 motion. We could just have it on for the next hearing date
20 and propose that order as -- with enough time so that, you
21 know, anyone could -- could object to it.

22 But maybe this is all moot because you'll be able
23 to locate him. But I -- but I -- failing that, I think that
24 -- that the alternative is probably the way to go.

25 MR. CHIAPPETTA: The only thing that would, we

Page 16

1 would like to comment, Your Honor, is without Mr. Dowd's
2 signature, we don't have a way to bind the individuals that
3 they will not implicate the policies going forward. That's
4 something that we're concerned about, which is why without
5 --

6 THE COURT: Well, he -- he purported to represent
7 them as part of this motion, right?

8 MR. CHIAPPETTA: He did.

9 THE COURT: So we can -- I can issue that order as
10 part of resolution of the motion. They're parties to the
11 motion.

12 MR. RATERINK: Actually, then that -- that
13 language, Your Honor -- this is Dennis Raterink again -- is
14 part of the reason that -- that we have a -- at this point
15 at least are unable to sign onto the stipulation as proposed
16 because the order goes beyond simply a notice to the
17 Michigan system and it attempts and purports to bind these
18 claimants to a course of action that the Michigan
19 administrative system would not require them to do.

20 THE COURT: But -- but they sought relief --

21 MR. RATERINK: And -- I'm sorry. Go ahead.

22 THE COURT: But they sought relief in the court.

23 MR. RATERINK: No. I understand, Your Honor. And
24 in the protection, I think, though that's already there is
25 the stay order. If they were to amend their claims and

Page 17

1 change the dates of injury alleged, the Michigan Funds
2 Administration, the insureds and -- and DPH attorneys are
3 already under an obligation to this Court to come back and
4 inform you if any cases are attempting to implicate the
5 policies in question.

6 THE COURT: Right. But -- but didn't their --

7 MR. RATERINK: So --

8 THE COURT: I mean, but didn't their motion seek
9 relief specifically for a finding that they -- that they
10 could go ahead without implicating? I mean, this is -- this
11 is the relief they wanted, so I --

12 MR. RATERINK: It does. And I think when you --
13 and that's one of the things that we had proposed to be
14 added to this stipulation if it was -- if it was going to be
15 entered without our signature was that this is -- any
16 indication that we can give to you and give to this Court as
17 to the current status of these claims, it's just that. It's
18 a snapshot. It's the way these cases are being addressed
19 right now because of what's being alleged in those claims.

20 But in the Michigan Administrative System, they --
21 as I said, they have full freedom to amend an alleged
22 different dates of injury at any time with no penalty. And
23 by doing that, again, that could change this status. We can
24 tell you that of those 70 files that only two of them
25 implicate the ACE at this point, but that could change

Page 18

1 tomorrow. That could change --

2 THE COURT: All right.

3 MR. RATERINK: -- next week.

4 THE COURT: Well, I haven't -- I haven't seen -- I
5 haven't reviewed the proposed stipulation and order,
6 obviously. But I was of the belief that it was -- it was
7 proceeding ahead and that it would -- it was basically going
8 to be ready to be executed.

9 But, you know, I think we should just actually put
10 it on the calendar for the next -- next hearing so we can
11 deal with it.

12 MR. CHIAPPETTA: Very well, Your Honor.

13 THE COURT: Okay.

14 MR. OLSHIN: Your Honor, this is Lou Olshin. I
15 represent ACE, and hearing Mr. Raterink I was wondering if he
16 would mind sharing with me the names of the 70 claimants
17 that he apparently has identified as well as any other
18 proposed changes to the stipulation which, to date, I have
19 not seen.

20 But I would say, as Your Honor mentioned
21 initially, that not having the Michigan defendants sign onto
22 the stipulation does create a level of discomfort,
23 particularly given what was just said; that if these cases
24 moved forward, the claimants might be free to change dates
25 of injury which would then implicate the ACE policies.

Page 19

1 THE COURT: All right. Well, I -- I guess I find
2 that hard to believe that Mr. Dowd has just vanished from
3 the face of the earth. So why don't we -- why don't we --
4 why don't you all put most of your effort in trying to find
5 him.

6 MS. PRZEKOP-SHAW: Susan Przekop-Shaw, Your Honor.

7 Mr. Olshin just talked about the stipulation and
8 we had acquired that from Nick Campanario and he also
9 attached to that list the cases that he felt were subject to
10 this particular motion. So I'm kind of surprised to hear
11 that Mr. Olshin hasn't seen that list.

12 And we don't have any knowledge of any other
13 stipulation than what was presented to us, and there really
14 is no --

15 THE COURT: Okay.

16 MS. PRZEKOP-SHAW: -- protective language in
17 there. So I think --

18 THE COURT: All right. So why don't you all just
19 --

20 MS. PRZEKOP-SHAW: -- we need a little
21 communication.

22 THE COURT: Why don't you all -- yeah. That's
23 fine. Why don't you all just follow up on the -- on that
24 offline?

25 MS. PRZEKOP-SHAW: Thank you.

Page 20

1 THE COURT: Okay. Thanks.

2 MR. CHIAPPETTA: Thank you, Your Honor.

3 That takes us to the last matter on the -- that's
4 listed on the seventy-sixth omnibus hearing agenda, which is
5 the motion by Ontario Specialty Contracting for leave to
6 file a late administrative claim.

7 This is Ontario's motion so with Your Honor's
8 permission I'll cede the podium to opposing counsel to
9 present their motion.

10 THE COURT: Okay. That's fine. Thank you.

11 MR. ORR: Good morning, Your Honor. Thank you.
12 Patrick Orr from Klestadt and Winters on behalf of Ontario
13 Specialty Contracting, Incorporated.

14 Your Honor, I'm happy to report that I think we
15 may have a way to get around what would be otherwise a
16 contested hearing this morning. In order to do that, I
17 think it may make sense for me to briefly give you some
18 background as to some of the events that occurred between
19 the filing of the papers that Your Honor may have already
20 seen and today, really within the last week or so.

21 The claim arises from a purchase order that was
22 issued by the debtor after a request for quotes that was
23 issued to Ontario Specialty. The purchase order sought
24 Ontario's services with respect to a plant in Rochester
25 where Ontario would come in, remove and demolish the inside

Page 21

1 of the plant, take all the scrap out of it, and due to the
2 value of the scrap, at least the anticipated value of the
3 scrap at the time of the contract, my client would actually
4 pay the debtor to do the demolition work in exchange for the
5 value of the scrap.

6 That purchase order was issued on July 24th of
7 2008. During the course of the next year, as work continued
8 at this Rochester facility, the amount of asbestos that
9 needed to be removed from the facility was much greater than
10 what the parties anticipated. The purchase order itself
11 provides that to the extent the work is greater or more
12 elaborate than what was contemplated, the parties would
13 agree to agree to an adjustment to the contract terms.

14 During the course of the year discussions ensued.
15 Ultimately, the debtor commenced a lawsuit in Erie County,
16 New York against my client. That lawsuit was commenced on
17 August 28th of 2009.

18 Your Honor, that action is still pending and on
19 May 15th, last week, the plaintiff in that action, which was
20 previously the debtor, filed an amended complaint seeking to
21 replace Delphi with GM components as the plaintiff in the
22 case.

23 At that point my client's local counsel in New
24 York engaged with GM Components' counsel in New York, and
25 earlier this week we were given a -- an email was sent to

Page 22

1 our -- our local counsel indicating that GM Components would
2 be willing to enter into a stipulation in -- in the Erie
3 County court which essentially says that all liability
4 arising from the underlying cause of action related to
5 assets and liabilities that were assumed by GM Components in
6 connection with a transaction that took place in this court.

7 As of today we're told that that attorney is
8 drafting a stipulation. We're hoping to get that within the
9 Next week. Assuming it says what they say it will say, we
10 would be -- we think that that would resolve all issues in
11 -- in this court.

12 THE COURT: Maybe you wouldn't have a claim
13 anymore in this court?

14 MR. OLSHIN: Exactly. We would be comfortable
15 that we would be able to recover to the extent that we -- we
16 -- we are ultimately successful in that litigation or it is
17 -- or it settles, if the plaintiff in that litigation, who
18 is not a debtor in this court, is willing to stipulate to
19 that, then we're okay. We would withdraw this motion --

20 THE COURT: Well, but -- but when you say the
21 plaintiff you mean the new plaintiff, the --

22 MR. OLSHIN: The new plaintiff, GM Components.

23 THE COURT: Right.

24 MR. OLSHIN: That's right, Your Honor.

25 We approached the debtors' counsel with this

Page 23

1 earlier this week, but they were unwilling to adjourn
2 today's hearing on consent. So we thought it was wise to --
3 to get you up to speed as to what happened in the last week
4 or so.

5 THE COURT: Okay.

6 MR. LYONS: Good morning, Your Honor. J

7 THE COURT: Good morning.

8 MR. LYONS: John Lyons on behalf of DPH.

9 Your Honor, this claim, the DPH has the
10 responsibility for administering claims that have been
11 filed. You know, we understand that there's this -- this
12 other state court action and GM Components, you know, may
13 well be transferring in as a party for DPH.

14 As Your Honor has seen from the briefs, this claim
15 is clearly, in our view, late. I mean, the face of the
16 proof of claim says it arose prior to June 1, 2009. It's a
17 fairly clear case. You know, again, when we -- when we had
18 the request, we had already incurred the expense of filing
19 the briefs. Mr. Chiappetta was already here in New York.
20 Mr. Rue had already paid for his ticket, so we just don't
21 see any --

22 THE COURT: Well, but it -- but on the other hand,
23 if, in fact, it's not anymore a claim against any of the
24 Delphi debtors because it's been a -- assumed by GM, I don't
25 really have jurisdiction over it.

Page 24

1 MR. LYONS: No. No. No. Your Honor, the way
2 that it works under the plan is we still have the obligation
3 to administer and object to claims. They may -- you know,
4 they were assigned to GM Components under the plan.

5 THE COURT: Right.

6 MR. LYONS: But -- but DPH still has the
7 responsibility to administer the claims --

8 THE COURT: That's part of the --

9 MR. LYONS: -- that were filed in this case.

10 THE COURT: That's part of the GM deal?

11 MR. LYONS: Yes. That's part of the -- of the
12 MDA.

13 And, Your Honor, you know, frankly, they can -- if
14 they want to work out whatever deal they want outside of the
15 plan and in their business relationship, that doesn't
16 concern DPH. But we still have a proof of claim here that's
17 on file through this estate, through this plan that --

18 THE COURT: Well --

19 MR. LYONS: -- that, you know, in our view, again,
20 was clearly late.

21 THE COURT: But can the estate bear any
22 responsibility to GM for not objecting to this type of
23 claim?

24 MR. LYONS: Well, Your Honor, the duty is on DPH
25 to object to claims that have been filed on the register, so

Page 25

1 --

2 THE COURT: Under the MDA?

3 MR. LYONS: Under the MDA. So -- so we have the
4 duty to -- and we have the duty to clean-up the claims
5 register before --

6 THE COURT: So --

7 MR. LYONS: -- we close the case.

8 THE COURT: Well, but -- but -- I mean, that's a
9 separate point because counsel said that there's a
10 reasonably good chance that the register will be cleaned up
11 by the GM entity stating that it assumes full responsibility
12 for the claim.

13 MR. LYONS: And, Your Honor, we have had no
14 conversations with GM Components. I -- as I said I don't
15 doubt in any way what counsel is saying, but -- but, you
16 know, again, we're -- we're ready to go now. We think it's
17 an easy call and, you know, perhaps Your Honor could
18 provisionally rule and if they want to withdraw it before
19 Your Honor enters the decision, but then we won't have to
20 come back here again if something falls apart between GM
21 Components and --

22 THE COURT: All right.

23 MR. LYONS: -- and Ontario.

24 THE COURT: Okay. Well, that's fair. I mean, I
25 -- not only the parties, but I've spent a fair amount of

Page 26

1 time preparing for this.

2 MR. ORR: Your Honor, if -- if I may, you know, I
3 -- I kind of cut to the chase with respect to what's
4 happened in the last week. We --

5 THE COURT: Right.

6 MR. ORR: -- we disagree that it's an easy call.

7 THE COURT: No. I -- I understand that. I'm just
8 -- I understand that. We're not getting into the merits
9 yet. I'm just trying to --

10 MR. ORR: I mean, Your Honor, we're not asking --

11 THE COURT: Do you have any -- anything in writing
12 for me to look at?

13 MR. ORR: I can present you with an email that we
14 received from -- from GM Components' counsel and -- and
15 Rochester.

16 THE COURT: Okay. Let me take a look at that.

17 MR. ORR: Sure.

18 (Pause)

19 MR. LYONS: Does counsel have a copy of that or I
20 -- I'm happy to --

21 MR. ORR: I'm sorry. I don't have an extra copy.

22 MR. LYONS: Okay. Your Honor, well --

23 (Pause)

24 THE COURT: Well, I mean, this really goes to -- I
25 mean, I'll show it to Mr. Lyons. But it appears to me that

Page 27

1 this email really goes to who's the proper party in the
2 state court litigation, not -- not whether GM, in fact,
3 absolves Delphi of its responsibility to deal with the claim
4 in the bankruptcy case. And I didn't -- the one aspect of
5 this -- you can give that to Mr. Lyons if you want.

6 The one aspect of preparing for this hearing that
7 I didn't spend a whole lot of time on was the state court
8 complaint, but my impression was that that was largely
9 separate and apart from this claim objection. I mean,
10 otherwise the parties would have said, I should have
11 abstained or something, you know, to -- to defer to the
12 state court. It just seems to me that he's not really
13 saying that; that Delphi doesn't have to do anything in this
14 -- in this litigation. In fact, I'm not sure he even knows
15 about this claim objection.

16 MR. ORR: Your Honor, I -- I agree that -- you
17 know, our -- our hope was that through the -- once we
18 received a draft of the stipulation it would be reworked
19 through various iterations and it would be something that we
20 could live with.

21 If it is, as I said earlier, then we would
22 withdraw our administrative claim in this case and the
23 motion compelling payment and then we're done. If it does
24 not, then we can come back in and have a hearing on this. I
25 think there's enough facts raised by both of the pleadings

Page 28

1 that it's not as clear a case as -- as the debtors' counsel
2 would have it.

3 Certainly, the work occurred during a certain
4 period --

5 THE COURT: Well, that's -- that's a separate
6 issue. I mean, I -- I'm just -- I don't want to get into
7 the merits. I wouldn't be putting this off because it's
8 difficult -- if it was difficult or -- or deciding it
9 because it's easy. If someone else is willing to pay your
10 client for it, that's -- you know, that's fine.

11 Would your client be prepared to pay the costs of
12 these people coming out here for this hearing to put it off?

13 MR. ORR: No. I -- no, Your Honor, because we
14 contacted them earlier this week and said that we were -- we
15 were prepared to adjourn the hearing for a brief period of
16 time to resolve this. So, you know, we would have preferred
17 to have not come today. We're here at the debtors' behalf.

18 THE COURT: Well, there was no request to adjourn
19 it to me.

20 MR. ORR: Our -- our understanding, Your Honor,
21 was that if it wasn't on consent, we were expected to be
22 here today. And --

23 THE COURT: Well, you could have asked for an
24 adjournment.

25 MR. LYONS: And, you know, Your Honor, also, we

Page 29

1 had already incurred a lot of the costs. You know, I mean,
2 again, it's the motion that we filed --

3 THE COURT: Well, this can -- this came up at the
4 last minute so that's -- that's a separate --

5 MR. LYONS: Right.

6 THE COURT: -- that's a separate point. I mean,
7 you're never going to get those costs back one way or the
8 other.

9 MR. LYONS: I mean, one other option, Your Honor,
10 is -- is perhaps both parties could waive any further
11 argument. Your Honor could decide on the papers if they
12 don't, you know, file a notice of withdrawal so we don't
13 have to come back, and you could just, you know, decide on
14 the papers.

15 I think Your Honor is pretty -- I mean, again, I
16 -- again, we've had a number of late claims with Your Honor
17 and -- and this one I think is -- is pretty straightforward.

18 THE COURT: All right. This is what I'll do. I
19 will -- I will hear argument today. I'll give you my
20 preliminary ruling. If -- if you're able to memorialize a
21 stipulation with the GM entity that -- where they take on
22 responsibility, then -- you know, within 30 days then the
23 ruling will just stay preliminary and of no force or effect.
24 If you're not able to do that, then it will become my final
25 ruling.

Page 30

1 MR. ORR: Very good, Your Honor.

2 THE COURT: Okay.

3 MR. ORR: With respect to -- with respect to
4 arguments, I -- you know, there's -- our papers, there have
5 been a -- several iterations of papers filed before the
6 Court. I think that the point that I would impress upon the
7 Court in considering the motion and the administrative claim
8 itself is that the debtor seems to be focusing on -- on the
9 fact that certain work occurred during a certain period of
10 time.

11 The fact remains that this initially was a
12 contract that contemplated my client paying the debtor. As
13 -- as the magnitude of the asbestos that was located in this
14 Rochester facility became aware to the parties that there
15 was more work that needed to be done to remove the asbestos
16 and as the market for scrap continued to decline through
17 2008, things shifted. So it's not so much just an analysis
18 of -- of when the work occurred, but it was the market --
19 market forces that were impacting what my client would
20 ultimately be able to recover under the contract.

21 It's not as clear cut. It's just the debtor
22 taking a statement from our papers that the services were
23 rendered during a certain date. I think things are a little
24 bit more in play than that, and I think that it wasn't until
25 the parties got together in September of 2009, went into a

Page 31

1 room and came out of a room that -- that the debtors'
2 position at that time was we're not paying, and my client's
3 position was, you need to pay, that we felt the claim had
4 fully matured.

5 THE COURT: Well --

6 MR. ORR: But you --

7 THE COURT: -- I don't understand that since the
8 May 27th, 2009 letter says Delphi's offer is unacceptable.
9 And that's the fourth letter laying out this claim dispute.
10 It's all pre-June 1.

11 MR. ORR: There -- there certainly were settlement
12 discussions, Your Honor. My client's view as that until
13 those negotiations had -- had terminated and it became clear
14 that this was going to litigation, it was at that point that
15 they felt that the claim had matured.

16 THE COURT: Well, but --

17 MR. ORR: It just so happens that the notice of
18 bar date -- the October notice of bar date for 2009 came
19 several weeks -- several weeks after that, which prompted
20 them to then file the administrative claim in advance of
21 what they thought was the bar date. But certainly September
22 of 2009 is well after July 15th of 2009.

23 THE COURT: Well, let -- let me just posit a
24 hypothetical with you.

25 Party X has a contract with Party Y. Party Y

Page 32

1 breaches the contract, but the parties engage in settlement
2 discussions. When does the claim arise; would those
3 settlement discussions finish or when Party Y breaches the
4 contract?

5 MR. ORR: Your Honor, it's -- it depends on the
6 facts, but, typically, it would be upon the breach of the
7 contract.

8 THE COURT: So, I mean, that's what's being
9 alleged here, although, frankly, I -- I think that, as a
10 separate matter, this -- this issue about delay is -- is
11 nowhere apparent in the letters. The letters all talk about
12 mutually mistaken belief that the scrap metal market
13 wouldn't collapse and the economic affect of the scrap metal
14 market. They were always willing to pay you for the
15 asbestos and the -- you know, the -- basically \$50,000.

16 It's the -- it's the change in the market that
17 they weren't particularly willing to pay for except to be
18 maybe accommodating since it appears that there was no -- no
19 harm to them for letting your client keep the scrap there
20 hoping that the market would turn around within a certain
21 period.

22 So it may well be that your client came up with
23 this rationale after the fact. But it was alleging that it
24 wanted to get out of the contract based on these facts
25 starting in November of '08. November 3 '08 is the -- is

Page 33

1 the first letter. And then there's one from April of '09,
2 and then there's a Delphi response from May of '09, which is
3 the proposal for dealing with the issues that OSC raises,
4 and then there's the May 27th letter which says this is
5 unacceptable.

6 So, I mean -- I mean, you -- it's pretty clear the
7 dispute was in existence going back to '08, but in any
8 event, it was a dispute that was not going to be resolved in
9 -- before June of '09.

10 MR. ORR: Your Honor, it's -- I can't -- I can't
11 contest any of the facts. The facts are what they are.
12 Again, my client's good faith belief was that there was no
13 need to file a claim until negotiations had terminated and
14 they were headed to litigation.

15 THE COURT: Okay.

16 MR. ORR: You know, the -- those are the facts.
17 The equities are such that this is a post-confirmation
18 contract. There was an expectation that payment would occur
19 in accordance with the contract without having to loop back
20 through the bankruptcy court. Rightly or wrongly, those
21 were the expectations and it was when they received the
22 October notice of 2009 that they believed at the time, in an
23 abundance of caution they were filing an administrative
24 claim.

25 Now they're in a position where their ability to

Page 34

1 collect on that claim -- we don't know how things are going
2 to turn out with this stipulation in state court, but
3 they're now in a lawsuit where --

4 THE COURT: What was different in October from --
5 from May? Did they had -- they had one more meeting to try
6 to resolve this dispute?

7 MR. ORR: Well, I -- I think -- yes, Your Honor.
8 That's -- that's what my client would testify to. But what
9 happened in October is that when they received the new bar
10 date notice for the later bar date, they were now in a world
11 that was -- it became very clear to them that they were not
12 going to get paid on this contract --

13 THE COURT: Why?

14 MR. ORR: -- and that they were at a loss.

15 THE COURT: Why was it any different from before?

16 MR. ORR: Well, I think there was parties going to
17 settlement discussions with the hope that an agreement would
18 be reached.

19 THE COURT: But they were already in settlement
20 discussions.

21 MR. ORR: But at -- by October of 2009, those
22 discussions had terminated. There was no -- the hope was
23 gone and litigation was eminent at that point.

24 THE COURT: Well, I mean, the May letter -- the
25 May 27 letter says this offer is unacceptable. In the

Page 35

1 absence of an agreement we will be forced to pursue legal
2 proceedings and will seek to recover the full claim. It's
3 pretty -- pretty definitive. They're certainly aware of a
4 claim.

5 I mean, frankly, I'm not sure there is a claim for
6 this anyway. I mean, it really does -- the whole point is -
7 - is because the market collapsed that there's no guarantee
8 of the market collapsing and the idea of there being delay
9 appears nowhere in any of these letters as causing the
10 market to collapse. They were aware of the market
11 collapsing shortly after the contract started to be
12 performed.

13 But that's, I guess, neither here nor there,
14 although it may go to the merits of the pioneer aspect of
15 this.

16 MR. ORR: I think that's -- I think that's right,
17 Your Honor, and I think that those issues will ultimately be
18 -- be resolved in the state court litigation. My concern is
19 that we're litigating with -- with both arms tied behind our
20 back and, you know, I understand that ultimately that may be
21 my client's fault, but that's -- that's what will happen.

22 THE COURT: Okay.

23 All right.

24 MR. ORR: Thanks.

25 MR. LYONS: Just very briefly, Your Honor. I

Page 36

1 mean, the face of the proof of claims that the date was
2 incurred between August 4th, 2008 and May 2009, and in the
3 responses they said the work was substantially complete by
4 May 2009. So if you look at it from just goods and services
5 type of benefit to the estate, all the stuff was done before
6 the June 1 --

7 THE COURT: Well, but -- but the claim itself
8 isn't really based on that. It's based upon, basically,
9 50,000 change orders and another 400,000 because the market
10 collapsed.

11 MR. LYONS: And that was before June 1, 2008.

12 THE COURT: And that was clearly before June 1.

13 MR. LYONS: Correct. So we hope, you know, just
14 again, you know, we certainly discussed these factors with
15 Your Honor in the past, but because it certainly was within
16 the control which is the control of Ontario to file this
17 claim for June 1 --

18 THE COURT: I mean, you're not -- you're not
19 disputing the amount that actually was provided -- I mean,
20 that -- that -- they didn't have to file a proof of claim
21 for the amounts that were being paid in the ordinary course,
22 right? It's just for this dispute that they had to file a
23 proof of claim for?

24 MR. LYONS: If there was something that was due in
25 the ordinary course after June 1, correct. But -- but,

Page 37

1 again, Your Honor, this was all -- this controversy, this
2 dispute was fully teed up. As -- you know, as discussed in
3 the May 27 letter, there was a dispute and there was a --
4 you know, and there was a live controversy between the
5 parties that, again, would clearly have made that claim
6 subject to the bar date.

7 THE COURT: Okay.

8 MR. LYONS: So other than that, Your Honor, we
9 would just rest on our papers unless Your Honor has any
10 questions.

11 THE COURT: Well, I did have one -- one question
12 and it -- and it goes to -- to the May 11th letter, which
13 was from Delphi's representative to Mr. Harton (ph) of
14 Ontario Specialty Contracting. Paragraph 3 of that letter
15 has three deductions and two additions to payments under the
16 contract. It says, "Changes to payments due to Delphi for
17 additional work will be deducted from payments owed to
18 Delphi as outlined below." And it's -- it's reducing it by
19 67,000 and change and then 42,000 which is part of the
20 claim, the 42,000, and then by \$73,115, which was also part
21 of the claim. Those two components adding up to about
22 \$9,000. And then there are a couple of additions.

23 So my question is what -- under the -- under the
24 bar date order what is the status of that? Is it part of an
25 integrated proposal and, therefore, not binding or do the

Page 38

1 parties actually agree to this aspect of it and you're
2 really just fighting about the scrap issue?

3 MR. LYONS: Your Honor, I'm -- again, we -- we
4 really responded to the motion based up the timing of the
5 accrual of the claim --

6 THE COURT: Right.

7 MR. LYONS: -- and didn't really get into the, you
8 know, actual merits and dollars and sense. I mean, to be
9 clear, Your Honor, if they have a defense. And this is --
10 again, this is, you know, based upon Your Honor's ruling in
11 Plymouth Rubber, you know, we're not taking away any defense
12 they may have in that state court action for some of these
13 deductions. We're just again seeking to -- to disallow the
14 claim and an affirmative claim against the estate.

15 THE COURT: Okay.

16 MR. LYONS: So I don't know if that answers
17 directly Your Honor's question, but I think it may -- it
18 certainly will be clear to Ontario that they still have
19 defense in the state court action. They just cannot seek
20 affirmative recovery.

21 THE COURT: Okay. All right. I guess that's
22 where I was coming out to; that -- that you propose
23 deductions and seem to have agreed to them subject to some
24 additions. But then looking at -- at the response, it
25 doesn't really deal with those. It just deals with the

Page 39

1 overall point on the -- on the market loss on the scrap
2 metal prices. So --

3 THE COURT: Right. And Ontario's obviously free
4 to talk to GM Components about any kind of set off or
5 defense as they have in the state court action.

6 THE COURT: Right.

7 Okay. All right. Anything more?

8 (No verbal response)

9 THE COURT: Okay.

10 MR. ORR: Nothing from Ontario, Your Honor.

11 THE COURT: Okay. I have before me a motion by
12 Ontario Specialty Contracting or OSC that seeks relief in
13 the alternative. First, a determination that OSC is not
14 bound by the June 16th, 2009 administrative expense bar date
15 order entered by the Court that set a July 15th, 2009 bar
16 date for administrative expense claims arising before June
17 1st, 2009, which actually was subsequently amended to cover
18 claims arising through a May 31st, 2009 by my order of July
19 15th, 2009.

20 And, second, that even if that order does apply to
21 the administrative expense claim, that OSC concededly did
22 not file until October of 2009, i.e. late, that an order be
23 issued deeming such claim -- which, again, was filed on
24 October 30th, 2009, to be timely. Notwithstanding that it
25 was filed after the May 31st, 2009 bar date.

Page 40

1 The debtors have objected to the motion and I find
2 and conclude that the debtors' objection should be granted.

3 With respect to OSC's first argument, OSC contends
4 that its proof -- I'm sorry -- that its claim for an
5 administrative expense, which it asserted in its
6 administrative expense claim of October 30th, 2009, did not
7 arise until after the May 31, 2009 period and, therefore, is
8 not covered by the June 16th, 2009 bar date order.

9 The claim is based upon a provision in paragraph 3
10 of the contract between the parties which states "Buyer" --
11 that is, Delphi -- "may at any time require seller" -- that
12 is OSC -- "to implement changes to the specifications or
13 designs of the goods or to the scope of any services or work
14 covered by this contract, including work related to
15 inspection, testing, or quality control.

16 " While buyer will endeavor to discuss any such
17 changes with seller as early as practical, seller will
18 promptly implement such changes. Buyer will equitably
19 determine any adjustment to price or delivery schedules
20 resulting from such changes, including buyer's payment of
21 reasonable costs necessary to implement such changes.

22 "In order to assist in the determination of any
23 equitable adjustment in price or delivery schedules, seller
24 will, as requested, provide information to buyer, including
25 documentation of changes in seller's cost of production and

Page 41

1 the time to implement such changes.

2 "In the event any disagreement arising out of such
3 changes, buyer and seller will work to resolve the
4 disagreement in good faith, provided, however, that seller
5 will continue performing under this contract, including the
6 manufacturing and delivery of goods and prompt
7 implementation of changes required by buyer while buyer and
8 seller resolve a disagreement arising out of such changes."

9 It's asserted in the proof of administrative
10 expense claim that this provision was breached by Delphi in
11 three ways and the motion reiterates that assertion.

12 First, it is asserted that Delphi learned with
13 OSC, after the contract was entered into, that additional
14 asbestos-containing materials beyond those projected by
15 Delphi when the contract was entered into were discovered at
16 the Rochester plant that was being demolished, which
17 resulted in substantial extra costs;

18 Second, Delphi also requested additional utility
19 and other work beyond the scope of work originally proposed;

20 Third, it is alleged that the underlying financial
21 basis for much of the contract, i.e. the market price for
22 scrap metal pursuant to which, on the net basis, OSC was
23 paying Delphi for the right to demolish the Rochester plant
24 and remove the scrap metal, changed so dramatically that the
25 contract should be revised.

1 It's not clear to me at all that that last point
2 would fit in to paragraph 3 that I've previously read,
3 although it is asserted in the motion and in the claim that
4 delays caused by Delphi resulted in the decreased recovery
5 by OSC as a result of the steadily declining scrap metal
6 price. I should note that although, as I'll note in a
7 moment, the several communications by OSC to Delphi with
8 respect to OSC's desire to renegotiate the contract all
9 refer to the decline in scrap metal prices, none of those
10 letters refer to that -- the harm to OSC being caused by
11 such decline as having resulted from Delphi's delay in any
12 way.

13 In any event, those are the three bases for the
14 administrative expense claim, and that is the provision of
15 the agreement pursuant to which the claim allegedly arises.
16 Reading that provision, it appears to me that if, in fact,
17 the condition for the equitable adjustment of the contract
18 price occurs, Delphi has an immediate obligation to honor
19 its obligation -- I'm sorry -- has an immediate obligation
20 to, at some point, adjust the price. The timing of that
21 adjustment will depend upon the parties' exchange of
22 information. However, the obligation arises when buyer
23 requires seller to implement changes which gives rise to an
24 equitable adjustment to the price.

25 It is clear from the parties' correspondence in

Page 43

1 respect of this issue of an adjustment to the contract price
2 that all of the grounds for the adjustment occurred before
3 May 31, 2009. As set forth in OSC's proof of claim and,
4 more specifically, in the proof of claim, paragraph 18:

5 "On or about November 3, 2008, as the
6 predemolition work was coming to a close, OSC wrote to
7 Delphi. OSC pointed out that the delays attributable to
8 Delphi and sought an equitable adjustment of the contract
9 price. Attached hereto as Exhibit C is a copy of a letter
10 issued by OSC on or about November 3, 2008.

11 "On or about December 3, 2008, OSC again wrote to
12 Delphi on this subject. Delphi representatives repeatedly
13 assured OSC that an equitable adjustment to the contract
14 price would be made and requested that OSC continue
15 performance.

16 New Paragraph 19: "On or about January 12, 2009,
17 OSC again wrote to Delphi on this subject."

18 The November 3, 2008 letter does highlight OSC's
19 contention that Delphi should modify the contract price in
20 light of the fact "we could not" -- "what we cannot do" --
21 this is OSC's representative writing -- "what we cannot do
22 is complete the project under the current financial
23 agreement" based upon -- based upon the fact that the
24 expected salvage materials' value has dropped from
25 \$1,326,850 to \$378,110.

Page 44

1 The second letter from January 12th, 2009 from OSC
2 to the debtors that's attached as an exhibit again refers to
3 the drop in the value of scrap metal and makes a proposal by
4 OSC which interestingly is one whereby OSC is proposing a
5 delay of performance under the agreement in the hope that in
6 the meantime scrap metal prices will improve.

7 In addition, OSC makes a specific claim for
8 additional asbestos abatement of \$41,500 and additional
9 utility work of \$22,000.

10 There's also an April 22, 2009 letter from OSC
11 again asserting the foregoing claims and providing more
12 detail in respect to them, in respect of the utility work
13 and the asbestos work and, again, focusing on the scrap
14 market price.

15 Finally, there's a response by Delphi attached as
16 an exhibit of May 11, 2009 where Delphi proposes a
17 resolution of the scrap metal price issue by partially
18 accepting or accepting in a revised way OSC's proposal to
19 delay performance of the contract and also proposing
20 monetary deductions from OSC's payments under the contract
21 in respect of, among other things, additional asbestos
22 abatement for \$42,000 and additional utilities' works --
23 work of \$7,315.

24 OSC promptly responds to that letter in an exhibit
25 that's also attached to the motion dated May 11th, 2009 --

Page 45

1 I'm sorry, excuse me -- dated May 27th, 2009 in which
2 Ontario Specialty Contracting senior project matter, Mr.
3 Harton, informs the Delphi representative that Delphi's
4 offer is unacceptable, refers to the parties' mutually
5 mistaken belief that the scrap metal market would not
6 collapse and, therefore, proposing that the contract should
7 be revised in a specific monetary amount in favor of OSC
8 over the current contract price of approximately \$195,000.

9 The letter closes by saying, in the absence of
10 agreement we will be forced to pursue legal proceedings and
11 will seek to recover the full claim.

12 It's clear from all of the foregoing
13 correspondence that by May 27th, 2009 and, frankly, clearly,
14 well before then OSC believed that it had a post-petition
15 right to recovery under the contract from Delphi on the
16 three grounds that are asserted in its October 30, 2009
17 (sic) proof of administrative expense claim. All of the
18 conduct giving rise to that claim or the facts giving rise
19 to it have occurred before May 31, 2009, the cutoff date for
20 the bar date order; that is, the extra work for asbestos
21 removal, the extra utility work, and the drop in scrap metal
22 prices all occurred before May 31, 2009.

23 And under the parties' contract, paragraph 3, when
24 it occurred Delphi had an obligation to equitably adjust the
25 parties' agreement to reflect any loss that would, in fact,

Page 46

1 be equitable as a result of such occurrence fitting within,
2 if it did, the terms of the agreement.

3 The definition of a claim under Section 1015(a) of
4 the Bankruptcy Code includes a right to payment whether
5 contingent or otherwise. An administrative expense, which
6 is here, the type of claim that was covered by the June
7 16th, 2009 bar date order is a slightly different animal.
8 Administrative expenses arise under the bankruptcy Code
9 under two circumstances:

10 One is where there is a post-petition transaction
11 with the debtor that gives rise to -- I'm sorry -- where the
12 consideration supporting the claimant's right to payment was
13 both supplied to and beneficial to the debtor-in-possession
14 and the operation of its business. See Trustees of
15 Amalgamated (Ph) Insurance Fund versus McFarlin's, Inc., 789
16 F.2d 98, 101 (2d. Cir. 1986) or where there has been a post-
17 petition tort or wrong to the claimant, reading V. Brown as
18 decided by the Supreme Court.

19 Here, the contract between the parties was a post-
20 petition contract satisfying the transaction requirement and
21 its provisions governed the parties' rights post-petition
22 and a post-petition breach of that contract would constitute
23 administrative expense claim or the claim for post-petition
24 breach would constitute an administrative expense claim.

25 But that breach, if it occurred, did, in fact,

Page 47

1 occur before May 31, 2009, the cut-off date in the bar date
2 order as reflected by the parties' correspondence and the
3 facts and, therefore, would be an administrative expense
4 claim that would need to be asserted as arising under the
5 contract before May 1, 2009 in order to be timely under the
6 June 16th, 2009 order.

7 Turning, then, to the second basis for the motion,
8 which is that OSC's filing of the admittedly late
9 administrative expense claim should be excused under
10 Bankruptcy Rule 9006(b)(1) based on excusable neglect, I
11 conclude that that aspect of the motion should be denied
12 also in that OSC has not established under the relevant case
13 law that it had the level of excusable neglect necessary to
14 obtain relief from the bar date order.

15 First, I should note that OSC asserts that it did
16 not receive notice of the June 16th, 2009 order. However,
17 it is asserted and supported by an affidavit of service in
18 the debtors' objection that, in fact, OSC did get notice of
19 that bar date order. Given the foregoing, there is a very
20 strong presumption under federal law that can only be
21 rebutted by specific facts and not by invoking another
22 presumption or by a mere affidavit to the contrary that, in
23 fact, OSC did receive notice of the bar date. See *In re:*
24 *O.W. Hubble and Sons, Inc., 180 B.R. 31, 34-35 (NDNY 1995);*
25 *In re: PT-Communications, Inc., 412 B.R. 85, 93-94, (BK EDNY*

Page 48

1 2009); and In re: R.H. Macy and Company, Inc., 161 B.R. 355,
2 360 (BK SNDY 1993); see generally In re: Data Corp., 2007
3 Bankruptcy Lexis 1934, Pages 13-15, (BK SDNY May 30, 2007).

4 OSC's motion does not set forth any of the types
5 of facts that would be necessary to rebut such presumption.
6 Therefore, it needs to show excusable neglect. Bankruptcy
7 Rule 9006(b)(1) permits a claimant to file a late proof of
8 claim if the failure to submit a timely proof of claim was
9 due to "excusable neglect." The burden of proving excusable
10 neglect is on the claimant seeking to extend the bar date.

11 In re: H.R. Macy and Company, 161 B.R. 260.

12 The Supreme Court has developed a two-step test
13 for determining whether a claim filed after the bar date was
14 due to excusable neglect in Pioneer Investment Services
15 Company v Brunswick Associates Limited Partnership, 507 U.S.
16 380 (1993).

17 First, the movant must show that its failure to
18 file a timely claim constituted neglect as opposed to
19 willfulness or a knowing admission. Neglect generally being
20 attributed to a movants inadvertence, mistake or careless.
21 Id. at 387-88.

22 After establishing neglect as opposed to
23 willfulness or knowledge or the bar date and the failure to
24 show any unknowing basis for neglecting it, the movant must
25 show, by a preponderance of the evidence, that neglect was

1 excusable.

2 That analysis is to be undertaken on a case by
3 case basis, although the Court is to be guided by and make
4 the determination in light of the following factors:

5 The danger or prejudice to the debtor; the length
6 of delay and whether or not it would impact the case; the
7 reason for the delay and, in particular, whether the delay
8 was within the control of the movant; and, finally, whether
9 the movant acted in good faith. Id at 395.

10 This -- I'm sorry. The Second Circuit in Midland
11 Cogeneration Venture, LLP v Enron Corp, In re: Enron Corp.
12 419 F.3d 115 (2d. Cir. 2005) has stated that the court "has
13 taken a hard line in opine -- in applying the Pioneer test.
14 In a typical case, three of the Pioneer factors -- the
15 length of the delay, the danger of prejudice and the
16 movants' good faith -- usually weigh in favor of the party
17 seeking the extension.

18 "We noted, though, that we and other circuits have
19 focused on the third factor, the reason for the delay,
20 including whether it was within the reasonable control of
21 the movant and we caution that the equities will rarely, if
22 ever, favor a party who fails to follow the clear dictates
23 of the court rule, and that where the rule is entirely clear
24 we continue to expect that a party claiming the excusable
25 neglect will, in the ordinary course, lose under the Pioneer

Page 50

1 test." Id. at 122-123.

2 See, also, In re: Northwest Airlines Corporation,
3 2007 Bankruptcy Lexus 521 at page 13 -- I'm sorry -- at Page
4 10-11, (BK SDNY 2007) noting that the Midland approach has
5 also been adopted by other circuits throughout the country;
6 and In re: Musicland Holding Corp., 2006 Bankruptcy Lexus
7 3315 at Pages 10-11 (BK SDNY 2006) in which then Chief Judge
8 Bernstein stated that the Second Circuit focuses on the
9 reason for the delay in determining excusable neglect under
10 Pioneer and that the other factors are relevant only in
11 close cases.

12 I conclude here that OSC's failure to file its
13 claim by the bar date was not willful or knowing.
14 Therefore, it -- it was negligent. However, it appears to
15 me to be clear that the late filing of the claim was clearly
16 in the control of OSC. It was very focused on the claim and
17 threatening legal action on it before May 31st, in fact,
18 just five days before May 31st of 2009. It had articulated
19 the claim in numerous letters leading up to that May 27th,
20 2009 letter threatening legal action.

21 The only excuse offered by OSC is that it believed
22 it was still in settlement discussions with the debtor and,
23 therefore, didn't need to file the proof of claim. However,
24 it is well established that the fact that parties are in
25 settlement discussions without more in the form of the

Page 51

1 debtors' waiving the filing of a bar date is not sufficient
2 to toll the bar date or to give a basis for excusable
3 neglect. See In re: Northwest Airlines Corp., 2007
4 Bankruptcy Lexus 521 at Page 14, "It cannot properly ground
5 its excusable neglect argument on the fact that it conducted
6 an investigation and tried to resolve the issue by good
7 faith negotiations. All of this can be done after a filing
8 is first made and rights are preserved."

9 See, also, In Re: Enron Corp., 298 B.R. 513, 526
10 (BK SDNY 2003) where the claimant asserted that it was
11 distracted by extensive negotiations prior to the filing of
12 the proof of claim. That decision was ultimately affirmed
13 in the Midland case at 419 F.3d. 115 that I previously
14 cited.

15 The cases cited by OSC in its motion are clearly
16 distinguishable in both In Re: Hudson Oil Company, Inc., 100
17 B.R. 72 (BK D. Kansas 1989) and In Re: Infiltrator Systems,
18 Inc., 241 B.R. 278 (BK D. Connecticut 1999). The creditor
19 either didn't know it had a claim because its claim was
20 likened, or it was given an ambiguous or misleading notice
21 with respect to the type of claim that it needed to file --
22 the type of claim that one would have that would require a
23 filing by the bar date.

24 So I conclude that the most important and
25 generally dispositive factor has not been established by

Page 52

1 OSC.

2 With respect to the other remaining factors, I
3 conclude that OSC, as is generally the case in these
4 matters, acted in good faith. However, I believe that the
5 danger of prejudice and the length of delay factors are, at
6 best, neutral and arguably tip in favor of the debtors.
7 When the debtors' plan as modified was approved in July of
8 2009, the debtor was facing a serious cash flow crisis. The
9 feasibility of the modified plan was jeopardized by the
10 possibility of unanticipated or larger administrative
11 expense claims which would have to be provided for in 100
12 cent dollars for the plan to be confirmed.

13 It was important, therefore, as I've ruled in
14 prior rulings on bar date issues that the universe of
15 administrative expense claims be quantified. That was why
16 anticipating a July confirmation date, the debtors
17 established an administrative bar date in June of 2009. The
18 plan was confirmed on the premise that the administrative
19 claims would fall within the limits contemplated by the
20 debtors and those investing in the plan.

21 Therefore, the delay in asserting the claim until
22 October, after the plan had been confirmed and gone
23 effective, is material even though it's a matter of a few
24 months. Moreover, certainly at the time the amount at issue
25 was meaningful as well as the integrity of the bar date

Page 53

1 itself.

2 So I find and conclude that OSC has not carried
3 its burden under Rule 9006 and Pioneer, and that its claim
4 is not timely.

5 OSC finally has argued in its motion that the
6 debtor itself is bound by a bar date of a sort. The debtors
7 objected to OSC's claim originally on the basis that it was
8 unmerited. They did that within the 180-day deadline set
9 for objecting to claims and never sought an extension of
10 that deadline with respect to OSC's claim. OSC then argues
11 that the amended objection, which adds the bar date
12 objection, is untimely.

13 However, I conclude that under the modified plan
14 -- again, which was approved on July 30th, 2009 and went
15 effective in October of 2009 -- that with respect to
16 objections based on untimeliness, the debtors did not have
17 to object to a administrative claim. Paragraph 10.2 of the
18 modified plan provides, "Any request for a payment of an
19 administrative claim shall be disallowed automatically
20 without the need for any objection from the debtors or the
21 reorganized debtors."

22 The plan governs on this point and, therefore, the
23 deadline to object to claims does not apply to objections
24 based upon untimely administrative claims like OSC's claim.
25 It applies only to objections based on other grounds,

Page 54

1 including as was, in fact, filed here the underlying merits
2 of the claim.

3 So for those reasons, OSC's motion will be denied.

4 As I noted during oral argument and as actually
5 Mr. Lyons pointed out, the motion is denied and the claim is
6 disallowed as an affirmative claim against the debtors'
7 estate. It is possible, although I'm not ruling either way
8 on this, that notwithstanding the bar date order and the
9 lateness of the proof of claim, OSC would still have rights
10 of recoupment under the contract or defenses under the
11 contract that it might still be able to assert from or
12 against the current contract party.

13 But, again, I'm not ruling on that issue today.

14 I'm merely denying OSC's motion and approving the debtors'
15 objection to the claim.

16 So the debtors can submit an order consistent with
17 that ruling.

18 MR. LYONS: Thank you, Your Honor.

19 THE COURT: Thank you.

20 You don't need to settle it on Klestadt and
21 Winters, but you should email Mr. Orr with a copy before you
22 email it to chambers.

23 MR. LYONS: We will, Your Honor.

24 THE COURT: Okay. Thanks.

25 MR. CHIAPPETTA: Thank you, Your Honor.

Page 55

1 That concludes the seventy-sixth omnibus hearing
2 with respect to all matters other than the adversary
3 proceeding.

4 THE COURT: Okay.

5 MR. CHIAPPETTA: We respectfully ask that Mr.
6 Lyons and I be excused and we'll turn the podium over to Ms.
7 Haffey.

8 THE COURT: That's fine.

9 MR. CHIAPPETTA: Thank you.

10 MR. LYONS: Thank you, Your Honor.

11 MR. ORR: Thank you, Your Honor.

12 THE COURT: Okay. Now I said something about the
13 -- this being a preliminary ruling. I guess I'm -- before
14 we -- we turn over to the -- Ms. Haffey, I'm prepared to do
15 that. If you have some resolution of everything within 30
16 days, but I am going to ask you to let me know that and
17 maybe that's when you should submit your order.

18 MR. LYONS: Will do.

19 THE COURT: I mean, not maybe. That's when you
20 should submit your order, 30 days from today.

21 MR. ORR: We would appreciate that, Your Honor,
22 and we'll -- we'll certainly keep the Court updated.

23 THE COURT: All right.

24 MR. ORR: Thank you.

25 THE COURT: Thank you.

1 Okay.

2 MS. HAFFEY: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MS. HAFFEY: Cynthia Haffey from Butzel Long on
5 behalf of DPH Holdings, Corp. and as stated before with me
6 today is Maria Caceres-Boneau and David DeVine.

7 Your Honor, we have -- I have before me the
8 adversary proceedings hearing agenda. Before I proceed with
9 giving the Court the agenda, though, I would like to give
10 the Court a status on the adversary proceedings.

11 THE COURT: Okay.

12 MS. HAFFEY: The last time we provided the Court a
13 status I -- in fact, I think Mr. Butler did it on our behalf
14 -- was in October of 2011. Since that time, Your Honor, we
15 have settled 15 additional cases. They have not -- some of
16 those settlements are still in the works. We're dotting our
17 I's and crossing our T's in them, but we have settlements in
18 principal on them. There are 10 cases which I call inactive
19 cases. Six of those are the subject of motions for entry of
20 default judgment today that are before the Court. So we
21 have 33 active preference cases.

22 THE COURT: Okay. Including those six default
23 motions?

24 MS. HAFFEY: Not including those, Your Honor.

25 THE COURT: Not including those. Okay.

Page 57

1 MS. HAFFEY: Not including those.

2 THE COURT: All right. All right.

3 MS. HAFFEY: Okay. We have the default motions,
4 Your Honor. we have --

5 THE COURT: And I -- I'm sure everyone's read the
6 Interstate Bakeries' case.

7 MS. HAFFEY: I'm sorry.

8 THE COURT: I'm sure everyone's read the
9 Interstate Bakeries' case. Well, let me give you the cite.

10 MS. HAFFEY: Please.

11 THE COURT: In Re: Interstate Bakeries' Corp., 460
12 B.R. 222, (8th Cir. Bap 2011). It deals with Rule 4, very
13 similar facts.

14 MS. HAFFEY: Thank you, Your Honor.

15 THE COURT: Okay.

16 MS. HAFFEY: The first motion, Your Honor, is a
17 motion by the reorganized debtors for entry of default
18 judgment in the Access Electronics, Inc. adversary
19 proceedings. There have been no responses filed and no
20 reply filed.

21 THE COURT: Okay.

22 MS. HAFFEY: And that is moving forward today.

23 THE COURT: All right. And it's -- it's doing so
24 consistent with the February 15th, 2012 order --

25 MS. HAFFEY: That's correct, Your Honor.

1 THE COURT: -- and the adversary proceedings
2 procedures orders. And I -- I've reviewed it and it will be
3 granted.

4 MS. HAFFEY: I'm sorry.

5 THE COURT: It will be granted.

6 MS. HAFFEY: Thank you, Your Honor.

7 The second motion is the motion by the reorganized
8 debtors for entry of default motion in the Anarbor Machine
9 Company adversary proceeding. And there have been no
10 responses filed, therefore, we didn't file a reply.

11 THE COURT: Right. And I -- again, for the same
12 reasons and on the same basis I've reviewed the motion and
13 I'll grant it.

14 MS. HAFFEY: Thank you, Your Honor.

15 Third is the motion by reorganized debtors for
16 entry of default judgment in the Applied Biosystems
17 adversary proceeding. Similarly, we've had no response
18 filed, so we did not file a reply.

19 THE COURT: All right. And, again, I'll grant the
20 motion for the same reasons after my review of the motion.

21 MS. HAFFEY: The fourth motion, Your Honor, is for
22 entry of default judgment in the Lanaco Engineering
23 adversary proceeding. Lanaco Engineering has not filed a
24 response. Therefore, we had no reply to file.

25 THE COURT: All right. And, again, I'll grant

Page 59

1 that motion and enter default judgment based on my review of
2 the motion.

3 MS. HAFFEY: The fifth motion, Your Honor, is for
4 entry of default judgment in the Production Specialty Group
5 adversary proceeding. Again --

6 THE COURT: Right.

7 MS. HAFFEY: -- no response was filed and,
8 therefore, we filed no reply.

9 THE COURT: And, again, I'll grant that motion for
10 the same reasons based on my review of the motion.

11 MS. HAFFEY: And the sixth motion, Your Honor, is
12 for entry of default judgment in the Viking Polymer
13 Solutions, LLC adversary proceeding. Viking Polymer did not
14 file a response and, therefore, we filed no reply.

15 THE COURT: Okay. And, again, I'll grant the
16 motion based on my review of the motion.

17 MS. HAFFEY: Okay. The seventh motion, Your
18 Honor, that we had on the hearing today for entry of default
19 judgment in the see -- in the adversary proceeding we are
20 adjourning that motion. There --

21 THE COURT: Okay.

22 MS. HAFFEY: -- have been some additional facts
23 that have come to our attention, so we are adjourning that.

24 THE COURT: Okay. All right.

25 MS. HAFFEY: And then lastly, Your Honor, is the

Page 60

1 motion by DSSI defendants for an order denying plaintiffs'
2 motion to amend and dismissing the adversary proceeding.
3 And that is Mr. Meth's motion so I will let him move
4 forward.

5 THE COURT: Okay.

6 MS. HAFFEY: Thank you, Your Honor.

7 MR. METH: May it please the Court, Your Honor,
8 appearing in the courtroom Richard M. Meth, Fox Rothschild,
9 LLP, local counsel for the DSSI defendants. I would also
10 like to thank the Court and chambers for allowing Mr.
11 Bowles, primary counsel for the DSSI defendants to appear
12 telephonically. Due to a variety of reasons Mr. Bowles was
13 unable to appear personally before Your Honor today. And so
14 we -- we thank Your Honor for that accommodation.

15 And with the Court's permission, I will make my
16 presentation from counsel table if that's all right.

17 THE COURT: Okay. Mr. Bowles, can you hear okay?

18 MR. BOWLES: Yes, Your Honor. Thank you very much
19 --

20 THE COURT: All right.

21 MR. BOWLES: -- for the Court's consideration.

22 THE COURT: Sure. Okay.

23 So you can go ahead, Mr. Meth.

24 MR. METH: Your Honor, the matter that comes on
25 before the Court this morning is actually quite simple. The

Page 61

1 issue may be stated as such: Whether the DSSI defendants
2 are entitled to the entry of a written order in conformity
3 with this Court's June 21, 2011 ruling with respect to the
4 September 7th, 2010 motion to amend that was filed by the --
5 by the debtors.

6 It is clear, based on the numerous portions of
7 colloquy and the -- and in particular the specific
8 statements by the Court and the discussion that Your Honor
9 and I had on pages 181 and 182 of that transcript that
10 although we wanted two forms of relief entered on that -- on
11 that date, that the Court clearly did deny the motion to
12 amend that was filed by the debtors, but set down for some
13 later date the potential filing of a new motion to amend by
14 the debtors should they choose to do so.

15 It is quite interesting that notwithstanding that
16 very simple issue, there has been a significant volume of
17 paper filed in response to our motion.

18 THE COURT: Well, can I -- can I interrupt you
19 just for a second?

20 MR. METH: Certainly, Your Honor.

21 THE COURT: The motion sought actually two things.
22 It sought an order dismissing the adversary proceeding and,
23 also, that that dismissal be with prejudice.

24 MR. METH: Yes, Your Honor.

25 THE COURT: I don't -- there's nothing in the

1 transcript to suggest it would be with prejudice?

2 MR. METH: No, there was not, Your Honor.

3 THE COURT: All right. And -- and, frankly, the
4 reason that we -- that we sought to, at least that we
5 requested prejudice was because of the significant length of
6 time that elapsed between the June hearing and the January
7 27th filing of our motion. We also noted that our motion
8 was quite similar to the relief that had previously been
9 sought by Microchip Technologies when they filed similar
10 requests for relief on October 7th and which we joined.

11 But we recognize that Your Honor did not
12 specifically and, in fact, did not --

13 THE COURT: And what happened --

14 MR. METH: -- state that the dismissal -- the
15 denial would be with prejudice. Your Honor reserved for a
16 later date should the debtors choose to renew their motion
17 to then address it on its -- on its facts and on the
18 circumstances at that later time.

19 THE COURT: Will you remind me what happened with
20 Microchip?

21 MR. METH: Microchip was -- was, I think, settled
22 prior to the return date of their request.

23 THE COURT: Okay.

24 MR. METH: And I believe on February 27th of this
25 year Your Honor actually entered an order dismissing that

Page 63

1 adversary proceeding with prejudice.

2 THE COURT: But that was based on --

3 MR. METH: A settlement reached.

4 THE COURT: -- a settlement.

5 MR. METH: That's correct.

6 THE COURT: Okay.

7 MR. METH: So -- so --

8 THE COURT: That -- that motion was never decided
9 then?

10 MR. METH: That's correct. It was not.

11 THE COURT: All right.

12 MR. METH: But it is -- it is clear and as noted
13 in the lengthy transcript that has been cited by both
14 parties and -- and many portions of which have been
15 presented to the Court, that Ms. Haffey and the debtors and
16 even the Court recognize that of all the then pending
17 adversary proceedings, the DSSI adversary -- the proposed
18 new DSSI adversary proceeding was unique among all others;
19 that it stood out; that if -- if -- with the Court's
20 indulgence the language that was cited or that was stated by
21 Ms. Haffey, for example, at page 110 of the transcript and
22 when it talks to -- with respect to, for example, a
23 particular paragraph that said, we don't have any documents
24 and -- but we believe that the defendant does. Ms. Haffey
25 said, in part, "this particular complaint with the paragraph

1 that was cited to you by counsel is a one of a kind and
2 unique complaint. You won't see that language anywhere
3 else." That's at Lines 11 through 14.

4 Thereafter in the transcript on page 114, the
5 Court said, "and so you're putting too, then, the task of
6 having to prove something and, you know, basically, just
7 crossing your fingers that they'll -- they won't." And I
8 think that's what Twombly were designed not to do. Ms.
9 Haffey then says, "Except in, again, DSSI is a unique" --
10 Your Honor responded, "I understand that" -- "situation in
11 its own." And the Court then said, "Yes."

12 But when all is said and done, Your Honor, one
13 simply needs to go -- although we've cited various other
14 portions of the transcript -- up until the end of the
15 morning session, which is set forth at pages 181 and 182,
16 and the very end of the day's transcript at pages 321
17 through 323, that it was clear that the decision that was
18 made on that date with regard to the DSSI defendants was --
19 was undeniable; that Your Honor stated that there was no
20 compliance.

21 There wasn't even a -- the scintilla of compliance
22 with the requirements of the Court's prior order of July of,
23 I believe, 2010, with the requirements imposed by the filing
24 of the September 7th proposed motion to amend, and the Court
25 said I'm not going to grant this motion to amend with

Page 65

1 respect to the DSSI defendants. It is clear. I'm not going
2 to rule should you choose to subsequently file a motion, but
3 that's not before me for this day.

4 And so what I am here before Your Honor asking,
5 notwithstanding the quotation that we cited and the excerpt
6 of the transcript that we cited from page 321 where Your
7 Honor, in response to requests so on the record Your Honor
8 said, well, I generally don't do that, but everybody's going
9 to abide by this record and everybody knows what I ruled and
10 knows what I determined.

11 All I'm asking because of the debtors' acting as
12 if Your Honor never made that ruling on June 21st is to
13 confirm in writing. We will put off for some other day a
14 decision should the debtors subsequently decide to file yet
15 another motion to amend, the various defenses that we have
16 to that, both equitable and legal, and whether -- whether
17 they can even now satisfy the prior requirements imposed by
18 the Court, this Court, and the requirements imposed by -- by
19 case law not the least of which are the U.S. Supreme Court's
20 decisions in Ickball (ph) and Twombly.

21 I would note that -- and this is certainly our
22 view of things -- that the debtors make much ado about an
23 order that was subsequently entered by Your Honor on
24 February 15th, which is simply a procedures order. The
25 procedures order as to which we have an agreement and an

Page 66

1 understanding between counsel that to the extent that it
2 might be deemed to apply to the DSSI defendants, that all
3 time constraints, that all deadlines, that all requirements
4 there under will abide a ruling by this Court as to this
5 very motion because if, in fact, this Court enters the order
6 that we are asking to -- that will confirm and be -- be in
7 conformity with its prior decision, then everything else
8 under that order will abide subsequent events.

9 And what -- notwithstanding, also, the statements
10 by counsel that we were involved in significant negotiations
11 and played a major role in the determination of that order,
12 interestingly in their surreply, the only emails that they
13 can attach deal with our suggestions of mediators.

14 Now the Court may ask why we suggested three
15 mediators. We fully expected that there was at least a
16 50/50 chance that the debtors might subsequently file yet
17 another motion to file an amended complaint. And if that
18 motion were to be filed and if notwithstanding what we
19 believe are very, very significant defenses and very
20 significant opposition to this Court yet granting still a
21 third bite at the apple, that there would be, in fact, a
22 procedures order that would then in that eventuality be
23 applicable to us.

24 And we also knew from a practical perspective that
25 the likelihood of our ability, our being able to negotiate a

Page 67

1 completely separate independent and different procedures
2 order with regard to our, as of yet still to be recognized,
3 still to be filed, still to be pending amended complaint,
4 our ability to diverge from that would be virtually nil.

5 So we said if that should happen and if we should
6 end up in mediation either because we're unable to settle
7 independently and then say, let's go to mediation, or
8 otherwise be bound by a procedures order, we said, let us at
9 least have some input as to potential mediators. That is
10 the sum and substance, that is the totality --

11 THE COURT: Well, but -- but let me -- I mean, the
12 hearing you're relying on was on June 21st, 2011.

13 MR. METH: That's correct, Your Honor.

14 THE COURT: This motion wasn't made until January
15 27th, 2012. I mean, normally, when someone wins on a motion
16 in front of me I -- I mean, always this is what I do, I say,
17 submit a proposed order. Why didn't I get a proposed order
18 denying the motion?

19 MR. METH: Your Honor, I -- I frankly anticipated
20 that would be your question. And, in fact, that was
21 something that we weren't sure of and that's why we cited --
22 we pointed out the Court's own statement that everybody's
23 going to be relying on this order, number one. Number two,
24 there --

25 THE COURT: Yeah. But I said --

Page 68

1 MR. METH: -- were still --

2 THE COURT: No. No. That -- no. That's not --
3 look, let me be clear, and I -- this is my rule and I think
4 it's consistent with the federal rules is bench transcripts
5 are not orders. You need an order in the docket. That's
6 what -- that's what counts.

7 MR. METH: That --

8 THE COURT: And particularly where one dismisses a
9 complaint. That can be a final order if -- if -- if leave
10 to amend is not granted. So I -- I just -- you know, I
11 understand if -- that I -- that I ruled that the debtors'
12 complaint against DSSI would be dismissed, but I never got
13 an order dismissing it.

14 MR. METH: Well -- well, I think --

15 THE COURT: So I -- I -- what I'm -- maybe I can
16 cut through this. It seems to me that both -- both parties
17 operated under the assumption that something else was going
18 on and that, procedurally, we were moving to a next -- the
19 next stage in the case.

20 Now I understand that you have a concern that you
21 don't want to lose your right to object to a request to
22 amend or for leave to amend, and that's appropriate. But
23 other than that, I -- I don't really see where this is
24 going.

25 MR. METH: Well, Your Honor, if I might, I think

Page 69

1 from a -- Your Honor properly notes and Your Honor has
2 always abided by the rules and always expected counsel to --
3 to abide by the rules, and that's why, frankly, on October
4 7th we filed the joinder in the Microchip Technologies,
5 which -- which raised the very same problem that we had.

6 We, like they, expected that an order would be
7 entered and I looked at the transcript, read it quite
8 carefully, and although I frequently expect to see and often
9 am involved where the Court will say, submit an order, that
10 was not there. It --

11 THE COURT: Okay.

12 MR. METH: -- may have been due to the fact that
13 it was an extraordinarily long day and, yes, under -- with
14 20/20 hindsight, Your Honor, should we perhaps have
15 presented -- have submitted an order under a notice of
16 presentment, yes. However, by joining in October 7th we
17 noted our intention to request the entry of the order.

18 We subsequently, by virtue of filing our motion in
19 January, made it quite clear that we always expected that
20 the motion to amend that had been filed in September of 2010
21 was denied; that there was no pending complaint. This Court
22 has never said, yes, this complaint is a pending complaint.
23 This Court has also made clear that the debtor has never
24 been precluded from filing a new motion in an effort to
25 correct the inadequacies of their original complaint and the

Page 70

1 inadequacies of their complaint that was -- that was filed

2 --

3 THE COURT: Well, so as a --

4 MR. METH: -- the proposed complaint.

5 THE COURT: -- so as a practical matter, what's --

6 I mean, is there a big deal in your doing that at this
7 point?

8 MS. HAFFEY: I'm sorry. A big deal in our doing
9 what, Your Honor?

10 THE COURT: In -- in your filing a Rule 15 motion
11 at this point?

12 MS. HAFFEY: Well, Your Honor, if -- if I could
13 just jump in here, procedurally what -- what happened after
14 that June 2011 hearing is this Court asked us -- it took
15 until October when we were here again on another matter, but
16 to get together with defense counsel and put together a
17 procedures order --

18 THE COURT: Right.

19 MS. HAFFEY: -- so that things could move forward
20 in all these cases.

21 THE COURT: Right.

22 MS. HAFFEY: And we did that. And it -- took
23 months, frankly, if the Court recalls --

24 THE COURT: No, that's clear.

25 MS. HAFFEY: It -- and in that order we put in the

Page 71

1 order our ability -- and negotiated this with defense
2 counsel and -- and DSSI's counsel received that draft order
3 as early as December before they filed this motion
4 permitting us to present the amended complaint with that
5 information filled in.

6 THE COURT: Right.

7 MS. HAFFEY: And it's particularly interesting in
8 this case, Your Honor, because --

9 THE COURT: But -- but let me -- but -- but let me
10 just -- I mean, all I -- I don't -- I don't really think
11 there's any basis here for dismissing with prejudice. I
12 mean, I'm very clear on that. Not -- and not just limited
13 to the fact that I didn't do that on June 21st. I don't
14 think there's a basis to dismiss with prejudice today
15 because I think that the delay here is attributable to
16 things other than -- you know, I think the parties have been
17 working in good faith, put it that way, and there's really
18 been no prejudice.

19 MS. HAFFEY: My --

20 THE COURT: But -- but I -- I do think that in
21 looking at the procedures order --

22 MS. HAFFEY: Uh-huh.

23 THE COURT: -- the February order the order does
24 have this procedure for -- for, as you've said, in (F) (3)
25 for identifying in a proposed amended complaint, et cetera.

Page 72

1 But (H) says at the Rule 15/Rule 4(M) hearing the Court will
2 conduct an evidentiary hearing to the extent necessary and
3 solely determine matters of notice, prejudice and any unique
4 to that Rule 15/Rule 4(M) defendant Rule 15 issues that have
5 not been previously decided by the Court.

6 So at least as I rule that, I'm not going to rule
7 again on -- on DSSI's motion that I heard on June 21st. I
8 think I've already dealt with that.

9 MS. HAFFEY: I --

10 THE COURT: As a practical matter, I don't think
11 there's much of a difference except that they have a right
12 to force you to make a separate motion under Rule 15 with a
13 complaint attached.

14 MS. HAFFEY: Yeah. The previously undecided by
15 the Court issues were if -- if the judge recalls was Mr.
16 Herman and Mr. Jacobs' request and it dealt with, I think,
17 things such as subject matter jurisdiction and other --

18 THE COURT: Well, but I -- I did decide this
19 issue, too.

20 MS. HAFFEY: I'm sorry.

21 THE COURT: But I decided DSSI's issue.

22 MS. HAFFEY: Well, in my review of the transcript
23 is is that you -- the Court clearly decided that the claim
24 -- the complaint as stated didn't state a claim as to
25 antecedent debt.

1 THE COURT: Right.

2 MS. HAFFEY: But the Court didn't make a
3 determination as, I think, Mr. Meth believes as to whether
4 or not we could then later either supplement or amend --

5 THE COURT: Oh, no. Absolutely.

6 MS. HAFFEY: -- the objection.

7 THE COURT: I agree with that. So it --

8 MS. HAFFEY: Right.

9 THE COURT: -- seems to be this is -- this is
10 actually a fairly --

11 MS. HAFFEY: So --

12 THE COURT: -- narrow -- this motion raises a
13 fairly narrow issue as far as consequences, which is it
14 would appear to me to be the better reading of this set of
15 facts that I should enter an order dismissing the complaint,
16 but giving you within the time coincidentally that I think
17 you have under this procedures order to make a motion to
18 amend attaching an amended complaint.

19 MS. HAFFEY: Well, and the only thing I would say
20 to that, Your Honor, is that we would -- under the
21 procedures order we believe that we covered our ability --

22 THE COURT: You thought you covered -- and I
23 understand that.

24 MS. HAFFEY: -- our ability to do that.

25 THE COURT: And I -- and I understand that

Page 74

1 completely, and so it's kind of annoying because I think
2 you're going to get to the same place anyway. But I guess
3 if, in fact, the complaint you attach still doesn't do the
4 trick, then they won't have to go through the rest of the
5 procedures order.

6 MS. HAFFEY: Okay.

7 THE COURT: I mean, I --

8 MS. HAFFEY: We will file that motion, then, Your
9 Honor.

10 THE COURT: I -- I mean, what I would suggest is
11 maybe you show the complaint to Mr. Meth and the exhibit and
12 maybe this -- maybe neither side will expand the money on --
13 on doing it.

14 MS. HAFFEY: I have one today that I can show to
15 him.

16 THE COURT: Well, I mean, he's not going to decide
17 today. He's going to have to talk to his --

18 MS. HAFFEY: No. But --

19 THE COURT: -- client.

20 MS. HAFFEY: -- I'm just saying we already have
21 one prepared, Your Honor.

22 THE COURT: Okay. So --

23 MS. HAFFEY: So it's a fairly simple --

24 THE COURT: -- so, I mean, I think that's --
25 that's probably how we should do it.

1 MS. HAFFEY: Okay.

2 THE COURT: Again, I don't -- I really don't fault
3 the parties on this. It's a -- it's a piece of a
4 complicated puzzle and, generally, that complicated puzzle
5 was dealt with in this procedures order.

6 MS. HAFFEY: It took us months.

7 THE COURT: And -- and the debtors could well, in
8 my mind, have been under the belief that that would have
9 taken care of this issue for DSSI, particularly given the --
10 that there wasn't a separate motion made beyond the joinder
11 until January, end of January, January 27th.

12 So I think that the timing point -- I could tell
13 you now I -- I cannot imagine a with prejudice denial based
14 on timing. It would only be based on the complaint that's
15 attached still not being one that would pass muster under
16 Rule 12.

17 And it would seem to me that if you have a
18 complaint with an exhibit to show DSSI's counsel that would
19 clearly, at least for purposes of Rule 12, pass muster, that
20 we should just move onto the procedures order at that point
21 and -- and just say that that's going to be the complaint
22 and some form of stipulation.

23 MS. HAFFEY: We -- and, actually, we would agree
24 with that, Your Honor.

25 THE COURT: Okay. All right.

1 MR. METH: I will specifically ask the Court if
2 the Court would like me to submit a new order --

3 THE COURT: Yes. That's fine. You -- you should
4 --

5 MR. METH: -- with regard to the ruling on the
6 motion.

7 THE COURT: Yes.

8 MR. METH: Okay.

9 Now, Your Honor, and --

10 THE COURT: Now as far as the amendment or the
11 motion to amend is concerned, what was your timing for --
12 well, you already have your exhibit, though, right, for
13 DSSI?

14 MS. HAFFEY: That's correct.

15 THE COURT: So I can give you, what, two weeks, 30
16 days?

17 MS. HAFFEY: That's -- that's fair, Your Honor.

18 THE COURT: All right. Thirty days, although you
19 could certainly do it earlier if you want to fit them into
20 your schedule generally under this order.

21 MS. HAFFEY: That's correct.

22 THE COURT: And -- but that gives you a little
23 time to show it to Mr. Meth and he can share it with the
24 counsel and with his -- Mr. Bowles and maybe you don't have
25 to deal with that actual motion at that point.

Page 77

1 MS. HAFFEY: Very good, Your Honor.

2 THE COURT: Thank you. Okay.

3 MR. METH: Now, Your Honor, I will this time
4 certainly submit a proposed form of order granting our
5 motion --

6 THE COURT: Right.

7 MR. METH: -- and denying their motion to amend
8 formally. From a procedural standpoint --

9 THE COURT: You don't need to settle it on -- on
10 counsel for the debtors. You should just run it by them in
11 advance so they --

12 MR. METH: Okay.

13 THE COURT: -- they can look at it.

14 MR. METH: The other question is --

15 THE COURT: But, again, it -- it -- what it does
16 is it denies their --

17 MR. METH: September 7th motion to amend --

18 THE COURT: -- their --

19 MR. METH: -- without prejudice, I understand.

20 THE COURT: -- without prejudice and gives them 30
21 days to make a motion under Rule 15 with the proposed
22 amended complaint attached.

23 And its denied for the reasons stated in the June
24 21st transcript.

25 MR. METH: Now, Your Honor, in order to make it

Page 78

1 clear, I don't know whether -- whether the Court feels it's
2 necessary for us to specifically state in the order that the
3 -- in light of the denial of the motion, that any of the
4 deadlines in the procedures order apply. I would submit
5 that they don't apply, but I want to make sure that we don't
6 --

7 THE COURT: Well, where is your agreement --

8 MR. METH: -- run afoul.

9 THE COURT: -- on that memorialized about the
10 deadlines?

11 MS. HAFFEY: We have an email exchange, Your
12 Honor, where DSSI's counsel requested the tolling of
13 deadlines --

14 THE COURT: Well, why don't you --

15 MS. HAFFEY: -- under this order.

16 THE COURT: -- why don't you put in the order that
17 the deadlines start to run from the date of the order?

18 MR. METH: Well, from the date of an order
19 allowing them to file an amended complaint.

20 THE COURT: Oh, okay.

21 MR. METH: Because right now --

22 THE COURT: Yeah. No. That's -- that's fine.

23 MR. METH: -- there's -- there's nothing pending.

24 THE COURT: That's fine.

25 MR. METH: So should we put anything in this order

Page 79

1 about that or --

2 THE COURT: Yeah. Why don't you -- I --

3 MR. METH: -- identify the --

4 THE COURT: -- I think there's enough -- I would
5 rather not just base it on emails. Just put it in the
6 order, say that the deadlines in the procedures order will
7 run from the date of an order, if any --

8 MR. METH: Okay.

9 THE COURT: -- granting the -- however you want to
10 define it -- the subsequent Rule 15 motion. Although,
11 again, I -- I strongly encourage the parties to -- if -- if
12 -- put it this way. I won't be very happy if I see enough
13 of the exhibit so it's clear that it passes Rule 12 that
14 we've had to have a hearing on this.

15 MR. BOWLES: Your Honor, this is Chip Bowles.
16 Just one thing. I assume that the requirements you had
17 previously announced in this Court for what has to be a
18 showing of an antecedent debt will core supply to this -- to
19 any new motion to amend that they file?

20 THE COURT: Well, I mean, I -- I don't -- broadly
21 stated, that's right. I need to see whether there is enough
22 notice to you all that there was an antecedent debt.

23 MR. BOWLES: Right.

24 THE COURT: So that you're not forced to, in
25 essence, prove their case. But whether that requires a

Page 80

1 specific forum or not, you know, I need to see it.

2 MR. METH: We do -- we also do, Your Honor, and --

3 THE COURT: I mean, before it was blank.

4 MR. METH: Well, no. Before --

5 THE COURT: And now --

6 MR. METH: -- there were -- there weren't even any
7 columns at all.

8 THE COURT: Well, I know. It was a blank column.

9 So --

10 MR. METH: No. There weren't even blank columns.

11 THE COURT: Well, I mean, it's the same thing.

12 MR. METH: Yeah.

13 THE COURT: But -- but I -- I'm not saying today
14 what needs to be in the column. I just need to be satisfied
15 that you're not -- you're not, you know, when did you last
16 stop beating your wife type of --

17 MR. METH: No. We --

18 THE COURT: -- position.

19 MR. METH: -- we understand. I think we know from
20 -- from Your Honor's prior directives at the June 21 hearing
21 what the Court has been looking for and what the Court is
22 demanding of the parties.

23 THE COURT: Okay.

24 All right.

25 MR. METH: Thank you, Your Honor.

Page 81

1 THE COURT: Very well. Thank you.

2 MS. HAFFEY: Thanks, Judge.

3 THE COURT: Okay.

4 (Whereupon these proceedings were concluded at 12:05
5 p.m.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Page 82

1 I N D E X

2

3 RULINGS

4	DESCRIPTION	PAGE	LINE
5			
6	Notice of Agenda Proposed by		
7	Fifty-Fourth Claims Hearing Agenda	--	--
8			
9	Sufficiency Hearing Regarding Proofs		
10	of Claim Numbers 15514, 15525 and 15526	--	--
11			
12	Notice of Agenda Proposed Seventy-Sixth		
13	Omnibus Hearing Agenda	--	--
14			
15	Motion by James Sumpter Regarding		
16	Extending Disability Benefits for Salaried		
17	Employees and Salaried Retirees - Vesting		
18	Motion Regarding Extending Disability		
19	Benefits for Salaried Employees and Salaried		
20	Retirees	--	--
21			
22			
23			
24			
25			

Page 83

1	I N D E X		
2			
3	RULINGS		
4	DESCRIPTION	PAGE	LINE
5	Motion by James Sumpter for Preliminary		
6	Injunction Regarding Salaried Disability -		
7	Expedited Request for Preliminary Injunction		
8	to Prohibit DPHH from Terminating Salaried		
9	Disability Plan	--	--
10			
11	Motion by Ontario Specialty Contracting, Inc.		
12	for Allowance of an Administrative Claim		
13	Pursuant to 11 U.S.C. 503(B)(1)(A), or in		
14	the Alternative, for Leave to File a Late		
15	Administrative Expense Claim Pursuant to		
16	Federal Rule of Bankruptcy Procedure 9006(b)	40	1
17			
18	Motion by James Grail to Lift Stay	--	--
19			
20	Motion to Dismiss Adversary Proceeding		
21	Motion of the DSSI Defendants For An Order		
22	Denying Plaintiffs' Motion to Amend the		
23	Complaint and, to the Extent Necessary,		
24	Dismissing the Adversary Proceeding With		
25	Prejudice.	77	15

Page 84

1 C E R T I F I C A T I O N

2

3 I, Sherri L. Breach, CERT*D-397, certified that the
4 foregoing transcript is a true and accurate record of the
5 proceedings.

6

7 Sherri L Breach

Digitally signed by Sherri L Breach
DN: cn=Sherri L Breach, o, ou,
email=digital1@veritext.com,
c=US
Date: 2012.05.29 16:26:47 -04'00'

8

SHERRI L. BREACH

9

AAERT Certified Electronic Reporter & Transcriber

10

CERT*D -397

11

12

13

Veritext

14

200 Old Country Road

15

Suite 580

16

Mineola, NY 11501

17

18

Date: May 29, 2012

19

20

21

22

23

24

25